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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. PETER ALEXANDER GRAHAM, Appellant.	2 CA-CR 2009-0331 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20084899

Honorable Charles S. Sabalos, Judge

AFFIRMED

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B R A M M E R, Judge.

¶1 Peter Alexander Graham appeals his convictions and sentences for possession of marijuana, possession of drug paraphernalia, and possession of a deadly weapon during a felony drug offense. He contends the trial court abused its discretion in denying his motion to suppress evidence, erred in denying his motions for a judgment of acquittal, and improperly instructed the jury on the charge of possession of a deadly weapon. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining Graham's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In the evening of December 3, 2008, Pima County Sheriff's Deputy Christian Gibson had stopped to help Deputy Lorence Jove with paperwork for a previously completed traffic stop. They were parked on the dirt median separating Roger Road from a parallel frontage road at the northwest corner of the uncontrolled Roger and Fairview Avenue intersection.

¶3 The deputies saw Graham and two other men walking towards them, with the flow of traffic in a dirt area north of Roger. There was no sidewalk adjacent to Roger in this area. They had approached the intersection and crossed it diagonally, walking towards a convenience store on the northwest corner. One man entered the store while Graham and the other stayed outside to speak to a person who appeared to be a store employee. Believing the men had violated A.R.S. § 28-796(B), by walking with the flow of traffic, and A.R.S. § 28-793(C), for failing to cross the intersection at a crosswalk, and

because of the "odd" and "suspicious" nature of their conduct at the convenience store, Gibson hailed them to stop.

¶4 Graham and one of the men approached the deputies, as the other left. The deputies noticed that Graham was wearing loose-fitting clothing and walked with his right arm kept close to his side at a forty-five degree angle, with his hand towards the front of his body. Gibson noticed Graham had an unusual "bulge" or "bunching" underneath his clothing. Gibson then frisked Graham for weapons as a matter of officer safety and discovered in Graham's waistband a loaded revolver for which he did not have a permit. Gibson arrested Graham for carrying a concealed weapon without a permit and conducted a pat-down search before placing Graham in his patrol car. During that search, Gibson found in Graham's front right pocket individually wrapped bags of what later was determined to be marijuana.

¶5 The state charged Graham with possession of marijuana for sale, possession of a deadly weapon during the commission of a felony drug offense, and possession of drug paraphernalia. After a two-day trial, a jury acquitted Graham of possession of marijuana for sale, but found him guilty of the lesser included offense of possession of marijuana. The jury also found Graham guilty of possession of a deadly weapon during the commission of a felony drug offense (weapons misconduct) and possession of drug paraphernalia. The trial court suspended the imposition of sentence and imposed concurrent, three-year terms of probation for each count. This appeal followed.

Discussion

Motion to Suppress

¶6 Graham first asserts the trial court abused its discretion in denying his motion to suppress evidence, alleging Gibson's initial stop and subsequent frisk violated the Fourth Amendment of the United States Constitution as well as article II, § 8 of the Arizona Constitution.[1] We review a trial court's denial of a motion to suppress evidence for an abuse of discretion. *State v. Szpyrka*, 220 Ariz. 59, ¶ 2, 202 P.3d 524, 526 (App. 2008). In doing so, we consider only the evidence presented at the suppression hearing and view the evidence in the light most favorable to upholding the court's ruling. *State v. Wyman*, 197 Ariz. 10, ¶ 2, 3 P.3d 392, 394 (App. 2000). We review the court's ultimate legal conclusions de novo. *State v. Box*, 205 Ariz. 492, 495, 73 P.3d 623, 626 (App. 2003).

¶7 The Fourth Amendment prohibits unreasonable searches or seizures and applies, inter alia, "whenever a police officer accosts an individual and restrains his freedom to walk away." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). A stop occurs when a reasonable person would believe that, in view of all the surrounding circumstances, he or she is not free to leave. *State v. Rogers*, 186 Ariz. 508, 510, 924 P.2d 1027, 1029 (1996), *citing Ornelas v. United States*, 517 U.S. 690, 693 (1996). Such stops are permissible if an officer "reasonably suspects that the person apprehended is committing or has committed a criminal offense." *Arizona v. Johnson*, ___ U.S. ___, 129 S. Ct. 781, 784

[1]The state incorrectly asserts Graham has raised "for the first time on appeal" the legality of the stop and search under the Arizona Constitution. Graham in fact had raised the issue and has not forfeited the argument as the state contends.

(2009).[2] Even if a stop is supported by reasonable suspicion, any subsequent frisk must be supported by further reasonable suspicion that "the person stopped is armed and dangerous." *Id*. Whether the officers here had reasonable suspicion is a mixed question of law and fact we review de novo. *Rogers*, 186 Ariz. at 510, 924 P.2d at 1029.

¶8 We first assess the trial court's conclusion that the officer's initial stop of Graham was constitutionally sound. Gibson testified that he had stopped Graham because he suspected Graham had violated A.R.S. § 28-796(B) and A.R.S. § 28-793(C), and because of the "odd" and "suspicious" nature of the conduct at the convenience store. Gibson stopped Graham by motioning for him to come to Gibson's location and saying, "[h]ey, I need to talk to you." Gibson and Jove both testified Graham was not free to leave. The court concluded the deputies reasonably suspected Graham had violated § 28-796 and engaged Graham in a "lawful investigatory detention."

¶9 On appeal, the state does not contend Graham was free to leave during his encounter with the officers, nor could it. *See Rogers*, 186 Ariz. at 510-11, 924 P.2d at 1029-30 (defendants not free to leave when police said "police officers, we need to talk to you"). Thus, a stop occurred. But Graham asserts this stop was unlawful and argues none of the reasons given by Gibson were sufficient to give rise to reasonable suspicion.

[2]Although Graham also argues the stop violated his rights under article II, § 8 of the Arizona Constitution, that provision provides no greater protection for searches conducted outside the context of the home than does the Fourth Amendment. *See State v. Johnson*, 220 Ariz. 551, ¶ 13, 207 P.3d 804, 810 (App. 2009). He requests that we reconsider this point of law in light of Justice Bales's dissenting opinion in *State v. Gant*, 216 Ariz. 1, ¶ 42, 162 P.3d 640, 649-50 (2007) (Bales, J., dissenting). But nothing in that opinion compels us to do so, and we decline the invitation. Graham provides no further argument to persuade us to overrule those parts of our prior decisions endorsing this proposition.

We conclude the trial court did not abuse its discretion in finding Gibson reasonably had suspected Graham had violated § 28-796 and therefore need not address Graham's arguments with regard to § 28-793(C) and the conduct at the convenience store.

¶10 Section 28-796(B), which governs pedestrian rights and duties on roadways, provides that "[i]f sidewalks are not provided, a pedestrian walking along and on a highway shall walk when practicable only on the left side of the roadway or its shoulder facing traffic that may approach from the opposite direction." Graham contends Gibson lacked reasonable suspicion that Graham violated these provisions because Graham was not walking on Roger's roadway or shoulder, and because Gibson allegedly was not in a position to determine whether it was practicable for Graham to walk on the left side of the roadway. Both arguments are unavailing.

¶11 First, Graham did not argue the inapplicability of § 28-796(B) to the trial court. Rather, he implicitly conceded the statute's applicability by arguing that it was impracticable for him to walk facing traffic on the south side of Roger, and that his conduct amounted, at most, to a de minimis violation of the statute. *See* § 28-796(B) (requiring pedestrian, "when practicable," to walk on left side of roadway or shoulder facing traffic). He thus has forfeited his inapplicability argument on appeal for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). But he has not alleged fundamental, prejudicial error, and therefore has waived the claim. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

¶12 Second, the record supports an inference that Gibson had been able to assess the practicability of Graham walking against the flow of traffic, even though he testified he did not know from where Graham and his companions had come when they began walking on the north side of Roger. Graham relies on *State v. Livingston*, 206 Ariz. 145, ¶ 10, 75 P.3d 1103, 1106 (App. 2003), wherein we held that statutory language requiring a driver to remain exclusively in a single lane only "as nearly as practicable" demonstrated the legislature's intent to avoid penalizing drivers for "brief, momentary, and minor deviations." Unlike the officer's testimony regarding the driver in *Livingston*, however, nothing in Gibson's or Jove's testimony suggested that Graham had walked only briefly or momentarily with the flow of traffic along Roger.

¶13 Gibson's testimony that it would be "contrary to common sense" for Graham and his companions to have walked on the opposite side of Roger is immaterial. His statement was made in response to a hypothetical question addressing the inconvenience Graham and his companions might have suffered in reaching the other side of Roger if they had begun their westward walk along Roger from a certain location. Importantly, Gibson testified there was nothing obstructing the area south of and adjacent to Roger. Gibson thus reasonably could suspect it was not impracticable for Graham and his companions to have traversed the area south of Roger, and the trial court did not abuse its discretion in so holding.

¶14 We next assess the trial court's conclusion that Gibson had reasonable suspicion to frisk Graham for weapons.[3] When evaluating the propriety of a frisk, we inquire "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry*, 392 U.S. at 27. Both Gibson and Jove testified Graham had walked with an unusual gait, which Jove demonstrated for the court. He portrayed Graham as having walked with "his arm noticeably against his waistband . . . [with] one arm swinging and one arm bent at 45 [degrees] stuck to [his] waist." And Gibson noticed an unusual "bulge" or "bunching" underneath Graham's clothing, near his waistband, that was "inconsistent with [Graham's] body type."

¶15 We agree with the trial court that these observations gave rise to a reasonable suspicion that Graham was armed. Although Graham attacks Gibson's testimony as "contradict[ory]" and as providing a "wholly inaccurate description of [Graham's] appearance," the weight and effect of conflicting testimony, if any, is to be resolved by the trial court. *See State v. Keener*, 110 Ariz. 462, 464, 520 P.2d 510, 512 (1974); *State v. Estrada*, 209 Ariz. 287, ¶ 22, 100 P.3d 452, 457 (App. 2004). And, to the extent Graham suggests any suspicion or danger was negated by his compliance with Gibson's command that Graham show his hands, we find such a suggestion unsupported by the record and unreasonable. Accordingly, the court did not abuse its discretion in denying Graham's motion to suppress.

[3]Because we conclude the initial stop was sound, we need not address Graham's contention that the frisk and subsequent discovery of the revolver and marijuana were fruits of the poisonous tree.

Rule 20 Motion

¶16 Graham next asserts the trial court erred in denying his motions for a judgment of acquittal, made pursuant to Rule 20, Ariz. R. Crim. P., on the charge for possession of a deadly weapon during the commission of a felony drug offense. A trial court must grant a Rule 20 motion "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a); *see also State v. Leyvas*, 221 Ariz. 181, ¶ 33, 211 P.3d 1165, 1175 (App. 2009). Substantial evidence is that which reasonable minds could consider sufficient to establish the defendant's guilt beyond a reasonable doubt. *State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996). "To set aside a jury verdict for insufficient evidence, it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987). We review a trial court's decision on a Rule 20 motion de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). Our review is deferential, however, to the extent that we view the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant. *See id*.

¶17 Section 13-3102(A)(8), A.R.S., provides that a person commits misconduct involving weapons by knowingly "[u]sing or possessing a deadly weapon during the commission of any felony offense included in chapter 34 of [the criminal code]." This requires "more than a mere temporal nexus between the weapon and the crime alleged," and the state must prove the defendant "intended to use or could have used the weapon to further the felony drug offense underlying the weapons misconduct charge." *State v.*

Petrak, 198 Ariz. 260, ¶ 19, 8 P.3d 1174, 1180 (App. 2000). "Factors tending to show that the weapon was or could be used . . . for a drug offense include the spatial proximity and accessibility of the weapon to the defendant and to the site of the drug offense." *Id.*

¶18 During trial, the court inquired of the parties whether possession of marijuana could support a weapons misconduct charge and requested that they submit supplemental briefing on the issue. In his brief, Graham argued that permitting all chapter 34 offenses to support a weapons misconduct charge would render the statute overbroad. He therefore requested that the verdict forms permit the jury to consider the weapons misconduct charge only if it found him guilty of possession of marijuana for sale. Before the jury began its deliberations, Graham moved for a judgment of acquittal, pursuant to Rule 20, arguing "there [were] no facts" supporting a conclusion he had "used or possessed the deadly weapon to further simple possession of marijuana." The court denied Graham's motion and request, concluding "the State ha[d] presented substantial evidence of the defendant's guilt on each and every element of the three crimes alleged in the indictment." After trial, Graham moved again for a judgment of acquittal, which the court denied.

¶19 On appeal, Graham makes a twofold argument that the trial court erred in denying his motions for a judgment of acquittal. First, he alleges the legislature did not intend § 13-3102(A)(8) to encompass the offense of simple possession of marijuana and cites in support the statute's legislative history. But because § 13-3102(A)(8) clearly and unambiguously permits any felony offense under chapter 34, including possession of marijuana, *see* A.R.S. 13-3405(A)(1), to support a weapons misconduct charge, we do

not address his argument further. *See Bilke v. State*, 206 Ariz. 462, ¶ 11, 80 P.3d 269, 271 (2003) (best indicator of legislative intent statutory language; if unambiguous, no other principles of statutory construction used to determine legislative intent); *State v. Miller*, 100 Ariz. 288, 296, 413 P.2d 757, 763 (1966) (ordinary meaning of statutory language used is best indicator of legislative intent); *State v. Payne*, 223 Ariz. 555, ¶ 16, 225 P.3d 1131, 1137 (App. 2009) (if statute unambiguous, no other principles of statutory construction employed to determine legislative intent).

¶20 Second, Graham alleges that, even if the legislature did so intend, the state failed to present substantial evidence at trial that he had used or possessed the deadly weapon to further his possession of marijuana. But Gibson found Graham's revolver in his front waistband, easily accessible and in close proximity to the marijuana. Factors tending to show a weapon was used to further a felony drug offense "include the spatial proximity and accessibility of the weapon to the defendant and to the site of the drug offense" and may be sufficient to establish the required nexus "depending upon the crime alleged." *Petrak*, 198 Ariz. 260, ¶ 19, 8 P.3d at 1180. Further, Gibson testified that Graham had told him that he carried the revolver for his "protection." A reasonable juror could infer, based on these circumstances, that Graham had carried the revolver to protect his marijuana. We agree with the trial court that the state had presented substantial evidence upon which the jury could conclude Graham "intended to use or could have used," *id.*, his revolver to further his felony drug offense. The court correctly denied Graham's Rule 20 motions for judgment of acquittal.

Jury Instruction

¶21 Last, Graham asserts that, even if the trial court did not err in denying his motions for a judgment of acquittal, it erred in instructing the jury on the weapons misconduct charge. The state argues Graham invited any error by requesting the instruction about which he now complains. We will not find reversible error if the complaining party invited the error it asserts. *See State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001); *see also State v. Pandeli*, 215 Ariz. 514, ¶ 50, 161 P.3d 557, 571 (2007). The invited error doctrine is designed "to prevent a party from 'inject[ing] error in the record and then profit[ing] from it on appeal.'" *Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d at 633, *quoting State v. Tassler*, 159 Ariz. 183, 185, 765 P.2d 1007, 1009 (App. 1998) (alteration in *Logan*). If the claimed error is not invited, we review a trial court's decision to give a particular instruction for an abuse of discretion, *see State v. Lopez*, 209 Ariz. 58, ¶ 10, 97 P.3d 883, 885 (App. 2004), but we review de novo whether the instruction properly stated the law. *See State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). In making the latter determination, we review the instructions the court gave as a whole. *See State v. Cox*, 217 Ariz. 353, ¶ 15, 174 P.3d 265, 268 (2007). Thus, "[a] case will not be reversed because some isolated portion of an instruction might be misleading." *State v. Guerra*, 161 Ariz. 289, 294, 778 P.2d 1185, 1190 (1989).

¶22 Before trial, Graham requested the jury be instructed that, to convict him of weapons misconduct, proof was needed that he had "committed the offense of possession of marijuana for sale" and, during the commission of that offense, "knowingly possessed a deadly weapon that [he] used, intended to use, or could have used to further [that

offense]." But, as noted above, Graham requested before jury deliberations that the verdict forms permit the jury to consider the weapons charge only if it first found him guilty of possession of marijuana for sale. The trial court denied that request, and thereafter instructed the jury that weapons misconduct required proof that "[t]he defendant committed the offense of possession of marijuana for sale or possession of marijuana," and during the commission of either of those offenses "knowingly possessed a deadly weapon that the defendant used, intended to use, or could have used to further [those offenses]."

¶23 On appeal, Graham argues this instruction was erroneous because it did not define for the jury that the phrase "could have used" requires, as he contends, "that the nexus between [use or possession of the deadly weapon and] the felony drug offense must be proximate and reasonable, and not merely conceivable or hypothetical." He contends he did not invite this error because he objected below to the giving of this instruction with respect to the felony drug offense of possession of marijuana.

¶24 But Graham did not object on this basis below to the "could have used" language with which he now takes issue. Rather, he argued only that it was the application of weapons misconduct to possession of marijuana that created an overbreadth problem. Notably, it was the trial court that first inquired into the quantum of proof required under *Petrak.* At the hearing on his post-trial motion for a judgment of acquittal, Graham stated that "[w]e submitted that we didn't object to that language because I think that the case law supports 'could have' in the context of . . . is there any evidence that this person might have/could have intended to further the drug offense."

The record thus reflects Graham requested the part of the instruction of which he now complains and did not object on the basis he now asserts. Accordingly, he invited the instructional error, if any, and we need not address his claim further.

Disposition

¶25 For the foregoing reasons, we affirm Graham's convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge